Editorial

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Training: a Challenge for the Future of International Arbitration

During the 1980s arbitration has become the straight-forward way of settling international commercial disputes. It is not so much because of its own merits, but because it is the only alternative to national court proceedings which, whatever their intrinsic qualities, are not adapted to the needs of international trade. As a rule, a party to an international contract is not prepared to accept the court jurisdiction of the country of the other party. The majority of states have understood the prominent role that international arbitration can play and, far from seeing it as unfair competition to the activities of their own courts, have decided to foster it by ratifying the 1958 convention. Some of them, such as England in 1979, France in 1981, Italy in 1983, Djibouti in 1984, Belgium in 1985, the Netherlands in 1986 and Switzerland in 1987 have modified their laws with a view to adapting them to the needs of international arbitration. Last, but not least, the United Nations Organization, through the UNCITRAL, is proposing to all countries of the world a model law for international arbitration which has already been introduced in Canada and Cyprus (1987) and which will be introduced in many other countries.

Unfortunately this situation, favourable to international arbitration, has its drawbacks. With the increase in the number of arbitration cases, the number of arbitrators and lawyers in international arbitration has also suddenly increased. As a result, the club atmosphere, which was typical of arbitration when I had my first contacts with it at the beginning of the seventies, has now been replaced in too many cases by a professionalism learnt in court proceedings.

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Quite naturally, trial lawyers who have built up an excellent experience in court proceedings in their respective countries try to transpose it to international arbitration, without taking into consideration that an international private procedure cannot follow the same pattern as a national public case.

On the other hand, the number of experienced arbitrators has become insufficient to meet practical needs. As a result, companies involved for the first time in an internaional arbitration case often appoint as arbitrator a person who may be a well-qualified lawyer or engineer, but for whom international arbitration proceedings are a fascinating mystery. This explains why the number of independent co-arbitrators is decreasing dramatically. The natural tendency of companies is to consider "their" arbitrator as "their advocate" within the arbitral tribunal and few inexperienced arbitrators know how to resist them—when they are convinced they have to resist them. In this respect, there is some ingenuity in the rules of many arbitral institutions which rightly stress that an arbitrator must be independent of the party which appoints him, and which define independence as the absence of another professional relationship with the appointing party. So many inexperienced people are competing to enter the realm of international arbitration, hastily presented as a new Eldorado, that the very choice of one of the competitors among others by a company is too often the source of the dependency. One of the consequences of this situation is that the number of unanimous awards is unfortunately decreasing. Dissenting opinions, which were exceptional ten years ago, are today creating a specific difficulty for institutions such as the ICC Court of Arbitration which did not anticipate, when drawing up their rules, that those opinions could exist.

These dissenting opinions, with a few exceptions, are the tribute paid by the arbitrator to the party by which he was appointed, and should not be encouraged. The experience of the courts in Common Law countries is of little value in this respect as the situation of an American or English judge has nothing to do with the situation of an arbitrator appointed by a party.

These difficulties are not surprising. Similar problems always occur in any system facing a growth crisis. The worst solution would be to try to close the door to inexperienced lawyers and arbitrators in international arbitration: it would die by asphyxiation. The only solution is in training, and several initiatives in this field are to be commended. Arbitration courses are given in London at Queen Mary's College. The ICC Institute of International Business Law and Practice regularly organizes useful training seminars, with mock arbitration cases. A School of Arbitrators is being set up in Bologna. It is necessary to go further in this direction and arbitration institutions and specialists have a duty to be imaginative. A foundation, for instance, which

would offer a study allowance to young lawyers for training periods with the international arbitration institutions and/or law firms specialising in international arbitration. Other ways have to be explored: the future of international arbitration is at stake.